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Utah Supreme Court

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In The Supreme Court of the State of Utah

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R. D. ANDRUS, VIRGINIA M. ANDRUS, JAN D. BATES, ANN K. BATES, LLOYD N. BECKSTEAD, JUNE H. BECKSTEAD, JESSE N. BENSON, ESTELLA D. BENSON, BRUCE R. BOWTHORPE, MARILYN R. BOWTHORPE, ROBERT P. CARLISLE, NORMA DEAN CARLISLE, ARTHUR CHILD, EDITH C. CHILD, CHARLES F. CONTANT, AGNES A. CONTANT, GENE V. CRAWFORD, SHERRY T. CRAWFORD, GARY A. FLANDRO, CHERI P. FLANDRO, IRWIN C. GLASER, FRAYDELL Z. GLASER, THOMAS E. HAGERMAN, JOYCE L. HAGERMAN, KEITH H. HARDY, ANNETTE H. HARDY, RONALD C. JONES, JOHANNA JONES, F. SCOTT KIRK, PEARL B. KIRK, CLYDE B. KIRKHAM, ERMA KIRKHAM, ROBERT P. KUNKEL, FRANCES KUNKEL, EUGENE C. LLOYD, LAURIE LLOYD, BARNARD J. McENTEE, ELIZABETH C. McENTEE, WILLIAM J. MERBACK, GLORIA D. MERBACK, HEBER C. PETERSON, CAROLYN T. PETERSON, ELEA-NOR E. PRADO, EDWIN A. READ, JOY E. READ, CECIL O. SAMUELSON, JANET M. SAMUELSON, NISHAN H. SHERANIAN, MARILYNN J. SHERANIAN, FARRELL M. SMITH, SANDRA R. SMITH, ANGUS K. SPROUL, LOIS B. SPROUL, FRANK M. STEINHARDT, EVA STEINHARDT, RICHARD R. TWELVES, VIRGINIA HALE TWELVES, SHIRL J. VARTY, RAMONA VARTY, J. ROBERT WELCH, DOROTHY K. WELCH, CLAUDE L. WESTENSKOW, and GLADYS B. WESTENSKOW,

Plaintiffs-Appellants,

vs.

STATE OF UTAH and its DEPARTMENT OF HIGHWAYS, SALT LAKE COUNTY, a political subdivision of the State of Utah, and GIBBONS & REED CO., a Utah corporation,

Defendants-Appellees.

ROBERT J. CAMERON, Plaintiff-Appellant,

vs.

J. P. GIBBONS, dba GIBBONS & REED CONSTRUCTION COMPANY, the STATE OF UTAH, a sovereign, and the COUNTY OF SALT LAKE,

Defendants-Appellees.

RICHARD GROTEPAS, Plaintiff-Appellant,

vs.

J. P. GIBBONS, dba GIBBONS & REED CONSTRUCTION COMPANY, and the STATE OF UTAH, a sovereign,

Defendants-Appellees.

BYU YOUNG UNIVERSITY
Reuben Clark Law School

Case No.
13716

BRIEF OF DEFENDANT-RESPONDENT
GIBBONS & REED COMPANY

FILED

**Appeal from a judgment of the District Court of
Salt Lake County, The Honorable Ernest F. Baldwin, Jr., Judge**

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TABLE OF CONTENTS

	<i>Page</i>
NATURE OF THE CASE	2
DISPOSITION IN LOWER COURT	2
NATURE OF RELIEF SOUGHT ON APPEAL	3
STATEMENT OF FACTS	3
ARGUMENT	10
POINT I UNDER THE EVIDENCE ADDUCED AT THE TRIAL, DEFENDANT GIB- BONS & REED COMPANY COULD NOT BE HELD LIABLE TO PLAINTIFFS FOR THE FLOOD DAMAGES SUSTAINED BY THEM	10
POINT II THE JURY'S FINDINGS AND ANSWERS TO INTERROGATORIES WHICH RE- LATED TO ISSUES OF FACT AND WHICH WERE SUPPORTED BY COM- PETANT EVIDENCE EXONERATED GIBBONS & REED COMPANY AND THE TRIAL COURT ACTED PROP- ERLY IN GRANTING JUDGMENT IN ITS FAVOR	17
CONCLUSION	30

CASES AND AUTHORITIES

76 Am. Jur. 2d, Trials, §1203	20
76 Am. Jur. 2d, Trials, §1204	27
76 Am. Jur. 2d, Trials, §1205	28
Anchor Casualty Co. v. McGowan, 168 Fed.2d 323 (5th Cir. 1948)	21
Engler v. Aldridge, 75 P.2d 290 (Kan. 1938)	16
First Security Bank of Utah, N.A. v. Lundahl, 22 U.2d 433, 454 P.2d 886 (1969)	18, 29
Gates v. Pickett & Nelson Const. Co., 94 Idaho 836, 432 P.2d 780 (1967)	13
Gelfand v. Strohecker, 150 Fed. Supp. 655 (N.D. Ohio 1956)	22, 27
Knape v. Livingston Oil Co., 392 P.2d 832 (Kan. 1964)	26
Koer v. Mayfair Markets, 19 U.2d 339, 431 P.2d 566 (1967)	23
Leninger v. Stearns-Roger Mfg. Co., 17 U.2d 37, 404 P.2d 33 (1965)	11
Lynch v. City of Jamesville, 204 N.W.2d 6 (Wis. 1973)	22
Marin Municipal Water District v. Peninsula Paving Co., 34 Cal. App.2d 647, 94 P.2d 404 (1939)	12, 24
Mason v. Mason, 180 Utah 428, 160 P.2d 730 (1945)	18

	<i>Page</i>
Monson v. Dupe, 299 P.2d 580 (Kan. 1956)	28
Pace v. Parish, 122 Utah 141, 247 P.2d 273 (1952)	30
Rasmussen v. Davis, 1 U.2d 96, 262 P.2d 488 (1953)	30
Rohr v. Henderson, 483 P.2d 1089 (Kan. 1971)	28
Slaton v. Union Electric Ry. Co., 145 P.2d (Kan. 1944)	22
Southeast Construction Co. v. Ellis, 233 Ark. 72, 342 S.W.2d 485 (1961)	15
Thompson & Kelly Co. v. United States M & S Ins. Co., 160 N.E. 668 (Mass. 1928)	22
Utah Rules of Civil Procedure, Rule 49(a)	18, 21, 29
Utah Rules of Civil Procedure, Rule 50(b)	20
Wintersberger v. Pioneer Iron & Metal Co., 94 N.W.2d 136 (Wis. 1959)	22
Wood v. Foster & Creighton Co., 191 Tenn. 478, 325 S.W.2d 1 (1950)	14
Zeiglash v. Durr, 326 P.2d 295 (Kan. 1958)	27

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Defendants-Appellees.

Case No.
13716

BRIEF OF DEFENDANT-RESPONDENT GIBBONS & REED COMPANY

NATURE OF CASE

These are three consolidated actions brought by residents of Salt Lake County against the State of Utah, Salt Lake County and Gibbons & Reed Company to recover for damage to their properties which occurred in connection with an extremely heavy cloudburst in August, 1969. The claim of plaintiff Robert P. Kunkel, et ux., relates also to a separate rainstorm which occurred in April, 1969. Cross-claims were filed by the State of Utah and Salt Lake County against Gibbons & Reed, which in turn counterclaimed against the cross-claimants.

DISPOSITION IN LOWER COURT

The matter was tried, as to the liability issues only, before a jury, with the Honorable Ernest F. Baldwin, Jr., presiding. At the conclusion of an eleven-day trial, the matter was submitted to the jury on special interrogatories. As noted in plaintiffs' brief, the jury found that the highway project of defendant State of Utah was unreasonably defective or dangerous. They also found that defendant Salt Lake County had unreasonably created a defective or dangerous condition in the utilization of its storm drains and that it was negligent in failing to provide reasonably adequate drainage facilities for the highway project. Thus, the jury found all issues against those defendants and in favor of the plaintiffs. Plaintiffs' statement as to the disposition of the matter in the lower court seems calculated to give

the impression that the jury also found all issues against defendant Gibbons & Reed. However, this is not true. Six interrogatories were found in favor of this defendant. Plaintiffs' treatment of this aspect of the matter is, at best, misleading and unfair.

At the conclusion of two hearings following the trial, the trial court ruled that the State of Utah was liable for the damages to all plaintiffs as a result of the flood, but that Salt Lake County and Gibbons & Reed were not liable for such damages. The court also ruled that Gibbons & Reed was not liable under the cross-claims of the State of Utah and Salt Lake County. An amended order and judgment incorporating such rulings was entered on May 15, 1974.

NATURE OF RELIEF SOUGHT ON APPEAL

Defendant-respondent Gibbons & Reed Company seeks affirmance of the order and judgment of the trial court.

STATEMENT OF FACTS

While it may be somewhat natural for an advocate to emphasize most strongly the facts that support his position, plaintiffs' brief carries that tendency to an unwarranted extreme. There is, in fact, almost a total disregard of any facts which favor Gibbons & Reed and support the actions of the trial court. For that reason,

Gibbons & Reed deems it necessary to bring to the court's attention a number of other facts which, it believes, will disclose to the court the basis for the rulings of the court below.

First, the construction phase of the highway project, Interstate 215, was preceded by many years of planning and study, particularly as to the drainage aspects (T. 1621, T. 1698, T. 1767). As noted by plaintiffs, Salt Lake County retained a prominent engineering firm, Caldwell, Richards and Sorenson, to prepare a Master Storm Drain Study in 1964 (T. 1621-23). Thereafter, another prominent engineering firm, Nielson & Maxwell, made further studies and completed the design of the drainage system (T. 1698-1700). The highway project, including the drainage system, was then designed by a consulting engineering firm, Rader & Associates, of Miami, Florida, (T. 1719). Finally, the detailed engineering and designing of the drainage facilities was performed by specialists in the Department of Highways (T. 1741). Many months of design work were spent by the department's hydraulic engineer and others even after the numerous studies and engineering work that had been accomplished earlier (T. 1767). Gibbons & Reed had only three weeks after receipt of the plans and specifications to complete and submit its bid for the construction of the highway project, including the relocation of numerous utilities and installation of the drainage facilities (T. 1776).

At the time of the flood, the drainage system had been fully completed and was in operation (T. 1481, T. 1556, T. 1589, T. 1802). This included various inlets and other aspects of the drainage systems to the east of the highway project (T. 1589, T. 1774, T. 1803). That system was expected to handle all of the runoff water which fell above the project (T. 1766, T. 1773-4). Curbing had not yet been installed on the west side of relocated Wasatch Boulevard. However, the center crest in Wasatch Boulevard is more than six-inches high (T. 1778), so the only water that the curb would have contained would have been that which fell between it and the crest, a relatively nominal amount (T. 1761, T. 1788).

As a number of photographs so graphically depict, the flood was of such immense proportions that a six-inch curb would have done little, if any, good (Exh. 101D, 104D, 105D, 107D). The photographs further show that in the area where there were curbs, they were completely filled with silt (Exh. 94D, 96D, 97D), and this was above the project where no construction had taken place. The west cutbanks, which were not subjected to the heavy floods from above, withstood the same rains with virtually no damage (Exh. 67-69P). This same photographic evidence, coupled with testimony from the Department of Highway's project engineer (T. 1516-17, T. 1556) also disclosed that no amount of precautions by Gibbons & Reed would have served to "protect the project" from the devastating waters that poured over the east cutbank.

The evidence was undisputed that Gibbons & Reed constructed the highway project entirely in accordance with the plans and specifications furnished by the State of Utah (T. 1556, 1584). There were no deviations from these plans and specifications and no problems arose during the construction in connection with the scheduling of the work by Gibbons & Reed (T. 1409, R. 350-380). All work was done in accordance with directions from the project engineer and his staff (T. 1407, T. 1448, R. 335-36). There were numerous inspectors on the job at all times, inspecting every aspect of the construction (T. 1406, T. 1792). All work was staked by the Department of Highways and Gibbons & Reed was required to follow these stakes within tolerances of a quarter of an inch (T. 1974).

Plaintiffs argue that while Gibbons & Reed constructed the highway project in accordance with plans and specifications and at the State's direction, it had discretion as to the sequence in which it accomplished various steps of the project. This argument is correct only to a very limited degree. It does not take into consideration either the inspection processes or the realities of construction work. The project could not be completed in a single stroke and the normal sequencing of events, required by good construction practices, dictated the order in which work was to be done (T. 1239, T. 1488, T. 1575, T. 1790). There are only two matters, for example, which could have any possible significance in connection with plaintiffs' appeal. One is the

fact that the concrete ditch liners had not been installed at the time of the flood. However, the evidence was clear that the concrete travel lands were just being poured and that it was necessary to then install asphalt shoulders and to grade from the shoulders to the surface on which the concrete ditch liners would be installed (T. 1488, T. 1790).¹

Similar sequencing problems prevented the installation of the curb on relocated Wasatch Boulevard. At the time of the flood, it was still necessary to install a high chain-link right-of-way fence (T. 1804) and part of the topsoil (T. 1411). This had to be completed before the curb was installed in order to prevent damage to the curb from vehicles and posthole diggers which would be required to install the fence. (T. 1804). In any event, as indicated above, there was no evidence showing that installation of such curb would have prevented any damage.

While plaintiffs make other arguments regarding the so called "protection of the project" during construction, these arguments are either disputed by the evidence or are grounded upon pure speculation. They argue, for example, that no grates had been placed over the storm drain laterals. The evidence is clear that such grates were not called for and the inlets were in-

¹ In any case, the jury specifically found that Gibbons & Reed Company had not failed to take reasonable precautions to provide proper drainage during the construction of the project (Int. J(2)).

stalled in accordance with the plans, specifications and directions of the State of Utah (T. 1743-45). The inlets had no provisions to accommodate grates (T. 1515, T. 1581), and to have installed grates would have been in violation of the plans and specifications (T. 1553). Moreover, the weight of the evidence indicated that such grates would have had a tendency to plug-up sooner than uncovered inlets (T. 1555, T. 1768, T. 1857). Plaintiffs also contend that no grass, sod or other materials had been placed, permanently or temporarily, to prevent erosion of the cutbank. There was no provision for installation of sod and the State would not allow the cutbank to be seeded until after September 1st (T. 1578). In any event, the photographs again graphically illustrate that neither sod nor seed would have had any effect (Exh. 39D, 94-95D, 97D, 101-105D). But beyond that, plaintiffs have ignored the fact that at the time of the flood the cutbanks had been graded to final level and Gibbons & Reed was in the process of spreading topsoil on them (T. 1411-15). Thus, it would have been impossible to have had the banks covered with sod, seed, burlap or anything else.

The contract between the State of Utah and Gibbons & Reed provided that the latter would be responsible for any storm damages unless the storm was of such unusual violence as to constitute an unforeseeable cause beyond the contractor's control, in which case the State would be responsible (T. 1447-8). In the present case, the State had paid Gibbons & Reed under such

contractual provision for all of the reconstruction work following the flood (T. 1829).

The damage sustained by plaintiffs Kunkel in April came from an entirely different drainage area and occurred before the engineering system had been installed and was functioning (T. 1373). The jury found that Gibbons & Reed had no liability as to the Kunkels (R. 727).

The storm which resulted in the flooding was of unusual intensity. Meteorologist Mark Eubank, called by the State of Utah, testified that it exceeded all other recorded storms in the State of Utah (T. 1612, T. 1615) with two and one-half inches of water falling in approximately thirty minutes (T. 1600, T. 1615). Even plaintiffs' witness, a long-time meteorologist in the State, testified that he knew of only one or two local storms which would equal it in intensity (T. 1319). The project engineer for the Department of Highways, who had been in charge of many highway projects, testified that no highway project on which he had ever been associated had sustained the amount of flood damage the present one did (T. 1517), although during its construction a number of heavy rainstorms had occurred which had resulted in very little damage (T. 1556). Despite a great amount of silt deposited at the lower terminus of the project, there was actually very little erosion along the medians or shoulders themselves (T. 1577, T. 1806).

Finally, Mr. Knowlton, the project engineer testified that he had given the matter considerable thought and couldn't think of any measures that could have been taken which would have accommodated the runoff water to which the project was subjected (T. 1516).

ARGUMENT

POINT I

Under the evidence adduced at the trial, defendant Gibbons & Reed Company could not be held liable to plaintiffs for the flood damages sustained by them.

Plaintiffs conclude their brief by arguing for application of the doctrine of inverse condemnation. In doing so, they call attention to the fact that they sustained a disproportionate loss as a result of the construction of a needed public improvement. In other words, they sustained damage because the State of Utah found it necessary to construct a modern highway project in proximity to their homes. This really is the crux of the matter. From the evidence it is clear that flood damage to plaintiffs was caused by the interaction of three factors, none of which were the responsibility of Gibbons & Reed. The first was the decision by the State of Utah to bisect the area above plaintiffs with the interstate highway. The second was the residential development of the area which disturbed the

natural drainage channels.² The third was the occurrence of the torrential cloudburst. In short, there was no evidence to indicate that Gibbons & Reed did anything other than what it was lawfully retained by the State of Utah to do. Rather, the evidence is undisputed that it constructed the highway project in accordance with its contract with the State.

The law is quite clear that under these circumstances, a contractor has no liability for damages that may result to third parties, even if such damages arose out of or in connection with the construction, especially where the construction is a public work being performed by a governmental authority, as it was in this case. The general rule in Utah in this regard is set forth in *Leninger v. Stearns-Roger Mfg. Co.*, 17 U.2d 37, 404 P.2d 33 (1965), as follows:

An important limitation on the rule placing building contractors on the same footing as sellers of goods is that the contractor is not liable if he has merely carried out the plans, specifications and directions given him, since in that case the responsibility is assumed by the employer, at least where the plans are not so obviously dangerous that no reasonable man would follow them. (404 P.2d 33 at 36.)

A case involving the construction of a public highway supporting the rule of *Stearns-Roger* is *Marin*

² As stated by plaintiffs' own expert, Mr. Jacobsen, "Man's development of this area has created a large part of the problem." (T. 1221).

Municipal Water District v. Peninsula Paving Co., 34 Cal. App. 2d 647, 94 P.2d 404 (1939). There the state's engineers and the defendant contractor knew of the existence of a pipeline. The contract provided that the contractor should take every precaution to preserve and protect the lines from injury or damage during construction. The evidence, however, showed that the work of the defendant was planned by the State engineers and the construction was supervised and directed them. It also showed that the work conformed to the plans and specifications furnished by the State and that everything done by the contractor was approved by the State's engineers.

In reversing a judgment against the contractor the court said:

. . . So far as the contractor is concerned, the proper rule of liability is thus stated in *Northwestern Pac. R. R. Co. v. Currie*, 100 Cal. App. 173 . . .:

Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted, and the contractor performs the work with proper care and skill and in conformity with the plans and specifications, but the work thus planned and specified results in an injury to adjacent property, the liability, if any there is, for the payment of damages is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power . . . (94 P.2d 404 at 406.)

The court noted that it is only where the contractor departs from the plans and specifications or performs the work in an improper or negligent manner that he becomes liable to third parties. Inasmuch as there was no testimony from a highway engineer to show that the defendant had performed the work in an improper manner and it was undisputed that the work had been done in accordance with the plans and specifications, there was no evidence to support the finding of negligence on the part of the defendant. In so ruling, the court noted that a provision in the contract that the contractor should preserve and protect the pipeline "in no way enlarged the liability of the contractor to third persons."

A recent case from a neighboring jurisdiction is *Gates v. Pickett & Nelson Const. Co.*, 94 Idaho 836, 432 P.2d 780 (1967), which, after adopting the general rule that a contractor who performs according to the plans and specifications is not liable for damage resulting from such construction, noted that the rule was particularly applicable where the work was directly supervised by the State of Idaho through the resident engineer of its Highway Department.

Other decisions demonstrate that the rule followed by this court in *Stearns-Roger* is even more applicable where a public project is involved. These cases hold that after a public authority engineers a project, it is not in the public interest to require the contractor to re-engineer it. This, the courts note, would substantially increase the cost of public projects and hence

the contractor is under a duty to perform according to the plans and specifications furnished it. Unless they are patently defective, it is not the contractor's duty, or even its prerogative, to question the adequacy of such plans and specifications.

Thus, in *Wood v. Foster & Creighton Co.*, 191 Tenn. 478, 235 S.W.2d 1 (1950), suit was brought against the contractor for removal of soil and trees resulting from the sloping of a cutbank during the construction of a highway. The court noted that the State Engineer had gone on the lots and placed stakes indicating removal of the soil and trees and the sloping of the cutbank. In reversing the decisions of the trial and intermediate appellate courts, the court stated:

It seems to us that as a practical matter in construction of public improvement, the contractor should be relieved from checking every order given it by the public authority. The state for whom the contractor works, does the engineering, stakes out the project, tells the contractor what grade and what to do and so long as the contractor complies with these instructions by its superior then the contractor is fulfilling its obligation. *If the contractor was required, at its peril, to check and double check all plans given it and required to keep an engineering force for the purpose of interpreting these plans, and was not permitted to follow the orders of the engineering force or its superior, then the costs of public improvement would be so increased as to make them almost prohibitive. The purpose of having the State Engineering De-*

partment for these public improvements is to lay out these projects and to tell the contractor where to do its work. The contractor's work is not the engineering job of laying out the project, but is merely in doing what it is instructed to do. So long as it does this work as it is instructed to do by its superior in a workmanlike manner, not negligently, then the contractor is not liable. (235 S.W.2d 1 at 2, emphasis added).

A similar case is *Southeast Construction Co. v. Ellis*, 233 Ark. 72, 342 S.W.2d 485 (1961). In that case Southeast Construction entered into a contract with the State of Arkansas to make changes in an existing highway. The plans and specifications were prepared by the Arkansas Highway Department. Plaintiffs alleged that during the course of construction, defendant Southeast deposited waste material in a negligent fashion, resulting in damage to the plaintiffs. The trial court found in favor of plaintiffs and defendant appealed. On appeal Southeast relied on the single point that the undisputed testimony showed that the deposit of waste material by it was done in accordance with the specifications and instructions of Arkansas Highway Department and, therefore, the trial court erred in entering judgment for the plaintiffs. In reversing the decision of the trial court, the Supreme Court of Arkansas noted:

. . . Appellants compliance with plans and specifications prepared by the Highway Department cannot be deemed to constitute negligence

(342 S.W.2d 485 at 488).

The court then went on to approve an instruction that if the defendant performed the construction in accordance with its contract and the governmental authority and “with that degree of skill that is ordinarily possessed and exercised by contractors doing the same or similar work” it could not be held liable to plaintiffs. The court concluded:

The appellee has been damaged. He should be compensated for his damages by the responsible governmental body rather than by the contractor who was obligated by his contract to perform according to the proper directions, plans and specifications furnished by the State Highway Department. (342 S.W.2d 485 at 488).

In *Engler v. Aldridge*, 75 P.2d 290 (Kan. 1938), the court ruled that a contractor on a state highway project was obligated by his contract and bond to perform according to the plans and specifications and that he could neither change the plans nor quit the work, even if he believed the improvement was bad from an engineering standpoint.

In the present case the jury’s finding that Gibbons & Reed constructed the highway project strictly in accordance with the plans, specifications and directions of the project cannot be disputed. The State has unequivocally indicated that there was no deviation by the contractor and plaintiffs have introduced no evid-

ence to the contrary. Indeed, it is interesting to note that there is nothing in the plaintiffs' entire argument relating to the standard of care of a contractor under the circumstances of this case. And, no where in their brief do plaintiffs provide a standard contrary to that set forth in the above decisions.

ARGUMENT

POINT II

The jury's findings and answers to interrogatories which related to issues of fact and which were supported by competent evidence exonerated Gibbons & Reed Company and the trial court acted properly in granting judgment in its favor.

Having examined the standard of care and the circumstances under which a contractor in the position of Gibbons & Reed will be held liable for damages to third parties, it becomes evident that the actions of the court below were proper and should be affirmed.

First, however, it is necessary to note the serious omissions in plaintiff's brief. As to Gibbons & Reed, plaintiffs have conveniently disregarded two very important factors. They make repeated references to a finding that Gibbons & Reed Company was negligent "in failing to take reasonable precautions to protect the project during construction", but make not mention

whatsoever of the fact that all other — more specific — interrogatories were answered in Gibbons & Reed's favor. Secondly, they make repeated references to the jury's "verdict." They attempt to make this court understand that the trial court disregarded or overruled the jury's verdict. However, the record clearly shows that this was not the case. There was no general verdict. The matter was submitted to the jury on written interrogatories under Rule 49(a), U.R.C.P. Consequently, the cases relied upon by plaintiffs to the effect that a jury verdict is not to be lightly set aside are not pertinent. These cases involve situations where a general verdict had been returned by the jury, upheld by the trial court and appellant had maintained on appeal that the evidence did not support the verdict. These cases, in fact, generally note that the trial court is in a more favorable position to observe the demeanor of witnesses and the like and thus the presumption, *on the part of the appellate court*, is in favor of the validity of the jury's verdict.

The case of *Mason v. Mason*, 108 Utah 428, 160 P.2d 730 (1945), cited by plaintiffs is equally irrelevant. That case involved a trial without a jury and the interrelation of the findings and conclusions to the judgment. It had nothing whatsoever to do with the issues presented here. In fact, the only cases cited by plaintiffs which dealt with written interrogatories under Rule 49(a) is *First Security Bank v. Ezra C. Lundahl, Inc.*, 22 U.2d 433, 454 P.2d 886 (1969). And, as will

be pointed out below, this case actually supports Gibbons & Reed, not plaintiffs.

Returning to the special interrogatories which were ignored in plaintiffs' brief, it will be seen that in light of the applicable law, the jury exculpated Gibbons & Reed. The jury found:

1. That the highway project of the State of Utah, including the storm drainage system, was unreasonably defective or dangerous (Int. A. T. 721).

2. Gibbons & Reed constructed the highway in conformance with the plans, specifications and directions given to it by the State of Utah (Int. L, T. 729).

3. Gibbons & Reed did not negligently follow plans, specifications and directions that were so obviously dangerous that no reasonable contractor would have followed them (Int. M, T. 729).

4. Gibbons & Reed performed the work required by its contract with the State of Utah with that degree of skill and care ordinarily possessed and exercised by contractors doing the same or similar work in this locality (Int. O, T. 729).

5. Gibbons & Reed was not negligent in failing to take reasonable precautions to provide proper drainage during the construction of the project (Int. J2, T. 728).

6. Gibbons & Reed did not negligently collect and divert flood water into the low point of the highway

project (Int. C, T. 725).

Additionally, the jury found that Gibbons & Reed was not negligent in any manner with respect to the flooding of the Kunkel property (Int. F, T. 727).

Thus, it can readily be seen that contrary to plaintiffs' contentions, there was not a verdict in favor of plaintiffs and against this defendant. Consequently, there was no need for a motion for a judgment n.o.v., Gibbons & Reed had twice moved, under Rule 50(b) for a directed verdict and had made a motion for a judgment in its favor on the interrogatories (T. 1455, T. 1861, R. 739-40). The trial court, in its discretion, chose to consider and reconcile all of the findings of the jury and in doing so, properly granted judgment for Gibbons & Reed.

The trial court's actions were justified on several well-recognized grounds; the first and foremost of which is lack of any substantial evidence to support the finding.

The general rule is stated in 76 Am. Jur. 2d, Trials, Section 1203:

... Where there is no evidence to support it, a finding as to a fact included within the issues is not required or proper, since it is not the office of a special verdict to find expressly on the issues, but only to find facts proved which are within the issues. In the absence of evidence to

support a material finding, it may be set aside or stricken from the record, and in the discretion of the court, judgment may be entered in accordance with the undisputed evidence in the case or the verdict may be set aside entirely and a new trial granted.

The rule is supported by numerous cases. For example in *Anchor Casualty Co. v. McGowan*, 168 Fed.2d 323 (5th Cir. 1948), the jury had answered special interrogatories in favor of the appellant. The trial court thereafter entered an order striking the jury's answers to Interrogatories Nos. 16 through 19. The appellant maintained that the court was powerless to set aside the findings or to change them, and that the most it could do was set aside the verdict and grant a new trial. In rejecting this contention (applying the federal counterpart to Rule 49(a)), the court stated:

There is no evidence in the record to support the jury's finding on special issues Nos. 16 through 19 . . . [They] should have not been submitted to the jury.

The fact that they were submitted and the jury answered [sic] is, however, harmless error
...

There is no inconsistency in the jury's findings; the fault lies in the fact that there was no evidence to support its findings on special issues Nos. 16 through 19. In such a case the court is justified in disregarding those of the jury's findings which are without support in the evidence and which are immaterial to the court's judgment.

Another case is *Thompson & Kelly Co. v. United States M & S Ins. Co.*, 160 N.E. 668 (Mass. 1928), in which the court stated:

There was no error of law in disregarding the answer of the jury to the question in connection with the other two cases . . .

In our opinion, the finding of the jury in answer to this question was not warranted by the evidence and the judge was justified in ruling as he did.

In *Gelfand v. Strohecker*, 150 Fed. Supp. 655 (N.D. Ohio 1956), the court held that an interrogatory which merely sought to determine if the defendant was negligent was one calling for a conclusion and continued:

Even if such an interrogatory had been proper, a finding of the jury that the defendant was negligent in any respect would not be supported by the evidence.

See also *Slaton v. Union Electric Ry. Co.*, 145 P.2d 456 (Kan. 1944); *Lynch v. City of Jamesville*, 204 N.W.2d 6 (Wis. 1973); *Wintersberger v. Pioneer Iron & Metal Co.*, 94 N.W.2d 136 (Wis. 1959). In the latter case the court stated:

If there is no credible evidence to sustain a jury's finding or answer, the trial court may and should change it.

The rule has been recognized by this court in *Koer v. Mayfair Markets*, 19 U.2d 339, 431 P.2d 566 (1967). In the *Koer* case the rule was actually extended much further than it need be here. The jury had answered all interrogatories in favor of the plaintiff, but the trial court, upon motion for directed verdict, disregarded the answers and granted judgment in favor of the defendant. This court affirmed on the basis that there was no substantial evidence to support the findings.

In the present case, there was absolutely no evidence adduced by the plaintiffs to establish that Gibbons & Reed was negligent in failing to protect the project. The only possible evidence in this regard related to the drainage system and lack of grates. But the jury specifically found that Gibbons & Reed was not negligent in failing to take reasonable precautions to provide proper drainage during the construction project (Int. J(2)). Thus, the finding under J(1) would have had to relate to something other than the drainage facilities. Yet a careful review of the record will indicate that there were no other areas where Gibbons & Reed could be held responsible, particularly in light of the jury's answer to Interrogatories L, M and O. Indeed, the complaint itself would not even support such a finding. The trial proceeded on plaintiffs' first and second causes of action and these would in no way put Gibbons & Reed on notice that plaintiffs were claiming damage for alleged "failure to protect the project." The interrogatory was, in fact, not even

requested by plaintiffs, but by the State of Utah in connection with its cross-claim. The only mention by plaintiffs of any such failure was when plaintiffs attorney was allowed to read a portion of the specifications between the State and Gibbons & Reed which provided that the contractor would take precautions to protect the project during construction (T. 1446-51).³ But, as noted in *Marin Municipal Water District v. Peninsula Paving Co.*, *supra*:

The provision of the contract between the State and defendant, above quoted, that the contractor should preserve and protect the pipeline, in no way enlarged the liability of the contractor to third persons. (94 P.2d 404 at 406)

Despite plaintiffs' persistent argument that the trial court abused its discretion in disregarding the answer to Interrogatory J(1), its contentions as to the manner in which that answer was supported by the evidence are limited (Pls. Brief pp. 31-33). Most of them have been answered, but will be touched upon here in the order that they were made. As to the removal of the curb along Wasatch Boulevard, it was necessary for Gibbons & Reed to remove and relocate Wasatch Boulevard in order to conform to its contract with

³ The provision expressly excluded damage due to unforeseeable causes beyond the control and without the fault or negligence of the contractor. A previous provision also provided that the contractor would not be responsible for damage to property due to design failure (T. 1446).

the State of Utah. Old Wasatch had previously occupied the ground upon which the freeway was built (T. 1472, T. 1561). Apart from the fact that there was no evidence to show that the small curb would have done anything towards holding back the torrential rainfall, there was no evidence to establish that Gibbons & Reed was negligent in following the normal sequencing procedures. And since, in a more specific finding (Int. No. 0), the jury found that Gibbons & Reed had performed the contract in accordance with the degree of care and skill customarily exercised by road contractors, the conclusion argued by plaintiffs is not justified.

Plaintiffs' contention regarding the concrete ditch liners has been answered previously, but it is also covered by the answers under the specific interrogatories, particularly No. 0. Plaintiffs' only other contentions relate to the drainage system, which the jury resolved against them, is the alleged failure to plant grass or sod. This is also explained by the fact that its contract would not allow Gibbons & Reed to plant until after September 1st and, certainly, there was no evidence of any kind that it should have covered the cutbanks with some other type of material pending the planting of such grass. Nor have plaintiffs ever explained how this would have done any earthly good in protecting the project from the raging waters pouring over the east cutbank or how it could have been accomplished while placing topsoil on the banks.

Finally, at the end of the trial there was some testimony by Mr. Jacobsen that upon one job with which he was familiar "ditch riders" had been employed. However, a review of that testimony (T. 1853) will disclose that it constituted no evidence at all as to the standard Gibbons & Reed, or anyone else, should have followed. Plaintiffs ~~contend~~^{CONCLUDED} their argument as to Gibbons & Reed by a somewhat inflammatory statement regarding the so called "vulnerability" of the project at the time of the flood. This statement is strictly contrary to the evidence. The project engineer, Mr. Knowlton, testified that at one time there was some vulnerability and precautions had been taken (T. 1520), but all of the testimony indicated that at the time of the flood, the drainage system was completely installed and there was no reason to expect any water to cascade upon the highway project from above. The system had been designed to intercept these waters above relocated Wasatch Boulevard and it was anticipated by all concerned that this would relieve the project from any water, except that which fell immediately upon it (T. 1520, T. 1562, T. 1766, T. 1773).

Apart from the inadequacy of the evidence, there are other established principles to support the actions of the trial court here. First is the well recognized rule that where answers to special interrogatories conflict, those which are in the nature of conclusions will give way to the more specific findings. Thus, in *Knape v. Livingston Oil Co.*, 392 P.2d 832 (Kan. 1964), the court said:

It also is the rule that general findings in the nature of conclusions, if contradicted by special or detailed findings, cannot prevail, but are controlled by and must yield to such detailed findings of ultimate facts. (392 P.2d 832 at 845).

The court went on to hold that a finding as to whether the defendant was guilty of negligence was "general in nature and amounted to nothing more than a conclusion." Again, in *Gelfand v. Strohecker, supra*, the court stated:

An interrogatory which sought merely to determine whether the defendant was negligent, without requiring the determination of the supporting facts would be improper [citing cases]. Such an interrogatory would illicit a bare conclusion without facts to support it. (1503. Supp. 655 at 663).

In *Zieglasch v. Durr*, 326 P.2d 295 (Kan. 1958), the court held that a special interrogatory as to whether the plaintiff was guilty of negligence which contributed to the accident was a conclusion, saying:

It almost amounts to a conclusion of law. It is therefore controlled by the undisputed facts and the specific findings. (326 P.2d 295 at 298).

Further, in 76 Am. Jur.2d, Trials, Section 1204, it is said:

A special verdict should find the facts of the case essential to a recovery and not conclusions

of law, which are exclusively for the court. *However, when a special verdict contains certain conclusions of law, but in addition states essential facts from which the court may properly draw conclusions as to legal liability, it is not reversible error for the court to disregard the conclusions of law in the special verdict and to enter the verdict justified by the findings of fact.* (Emphasis added)

In Section 1205, *ibid.*, the additional comment appears:

Hence, a special verdict finding that one of the parties has been guilty of negligence, without finding the primary fact on which the inference is based, is a mere statement of a conclusion and will not support a judgment.

It is also generally accepted that in interpreting answers to special interrogatories, the court must look at the answers as a whole and not single out isolated interrogatories. Thus, in *Monson v. Dupe*, 299 P.2d 580 (Kan. 1956), it was held that isolated answers could not be singled out and that to give the answers the effect for which the appellant contended would compel the court to ignore other answers and instructions of the trial court. It was further held that if the answers are consistent with each other and are sufficiently full and complete in themselves, the judgment must follow the special findings even though they cannot be reconciled with the general verdict. See also *Rohr v. Henderson*, 483 P.2d 1089 (Kan. 1971). It

seems clear that the jury in the present case felt that Gibbons & Reed had performed its duties under the contract competently and that it had in all instances complied with the plans and specifications.

Finally, Rule 49(a) itself gives the trial court a certain latitude in connection with findings. For example, it provides that the court may make findings on issues not submitted nor requested to be submitted and further allows it to submit interrogatories in the manner or form it deems most appropriate. It also provides that where an issue is omitted without demand that a court may make a finding or failing to do so, "it shall be deemed to have made a finding in accord with the judgment on the special verdict."

Plaintiffs' reliance upon *First Security Bank of Utah, N.A. v. Lundahl*, 22 U.2d 433, 454 P.2d 886 (1969), is misplaced. In that case the trial court had made a further finding completely opposed to the findings of the jury, even though it had purportedly accepted and approved the jury's finding. This court recognized the trial court's discretion to make corrections of errors or defects in the findings and to make additional findings on issues that were not submitted, but merely held that the trial court could not make "further" findings inconsistent with those of the jury.

Plaintiffs also argue that the trial court must give effect to the intention of the jury. Gibbons & Reed submits that is exactly what was done in the present

case. Plaintiffs also cite *Pace v. Parish*, 122 Utah 141, 247 P.2d 273 (1952). There this court merely held that an attempt should be made if reasonably possible to harmonize seemingly inconsistent findings. Again, that is what was done here.

The court determined that Interrogatory J(1), as it related to plaintiffs, was submitted in error and that there was no competent evidence to support it. While the trial court's announced reasons for its decisions were not reported, it is a rule followed by this and all appellate courts that if there is any basis upon which the actions of the trial judge can be sustained, it is the duty of the appellate court to do so. See, e.g., *Rasmussen v. Davis*, 1 U.2d 96, 262 P.2d 488 (1953).

CONCLUSION

The trial court concluded that the jury, in applying the applicable standard of care set forth in the instructions, had determined that Gibbons & Reed had constructed the highway project in accordance with the plans and specifications; that those plans and specifications were not so obviously dangerous that no reasonable contractor would follow them, and that it had performed its work with the degree of skill and care ordinarily possessed and exercised by other contractors doing the same or similar work in this locality. These findings were based upon clear and undisputed evid-

ence. The trial court properly concluded that the isolated answer to Interrogatory J(1) was not only unsupported by the evidence, but was conclusionary in nature and could not be reconciled with these more specific findings (as well as two others) which exonerated Gibbons & Reed. Hence, it properly disregarded that answer. To accept the plaintiffs' contentions would compel this court to ignore the facts and disregard the intentions of the jury.

Respectfully submitted,

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JERMAN & DART

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